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IN THE

Supreme Court of the United States

No. 126.

October Term, 1953.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MARINE ENGINEERS BENEFICIAL ASSOCIATION, NO. 13.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR MARINE ENGINEERS BENEFICIAL ASSOCIATION, NO. 13, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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OPINIONS BELOW.

The opinion of the court below (R. 50-56) is reported at 202 F. 2d 546. The decision and order of the National Labor Relations Board (R. 34a-40a) are unreported.

JURISDICTION.

The decree of the court below was entered on April 3, 1953 (R. 56-57). The petition for a writ of certiorari was filed on June 16, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 and under Section 10(e) and (f) of the National Labor Relations Act, as amended.

QUESTION PRESENTED.

Whether a party who files a charge of unfair labor practices with the National Labor Relations Board and secures the issuance of a complaint thereon, is deprived of rights accorded to it by the National Labor Relations Act, the Administrative Procedure Act and the Board's Rules and Regulations when the Board issues a final order denying in part the relief sought by the charging party, without holding any hearing or otherwise progressing the complaint through the usual procedural steps provided in the National Labor Relations Act and in the Rules and Regulations issued thereunder but rests its order solely on a stipulation entered into by the offending party and the Board's counsel over the objection of the charging party.

STATUTES AND RULES INVOLVED.

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 146, 29 U. S. C. Supp. V, 151, *et seq.*), of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1001, *et seq.*), and of the Board's Rules and Statements of Procedure are set forth in Appendix A, *infra*, pp. 23 *et seq.*

STATEMENT.

The proceedings before the National Labor Relations Board were instituted by the filing on January 2, 1952, by the Marine Engineers Beneficial Association, No. 13, hereinafter called M. E. B. A., of a charge of unfair labor practices against the United Marine Division, Local 333-A, International Longshoremen's Association, A. F. L., hereinafter called I. L. A., and against William V. Bradley (R. 1a-4a). The charge insofar as here material alleged as follows:

M. E. B. A. is an association composed of licensed marine engineers which is and has for the past thirty years been the exclusive collective bargaining representative of

the licensed marine engineers in the Port of Philadelphia (R. 2a). M. E. B. A. has in the past entered into yearly contracts with Taylor & Anderson, P. F. Martin, Inc., Independent Towing Co., Curtis Bay Towing Co., Sheridan Transportation Co. and L. B. Tucker and Sons, each of whom operates tugs in the Port of Philadelphia, said six companies jointly being hereinafter called the Operators (R. 2a). These contracts have fixed the compensation, hours and working conditions of the licensed marine engineers who man the tugs of said companies (R. 2a). The most recent of such contracts was in force up to December 31, 1951 (R. 2a).

Beginning on or about December 23, 1951, the I. L. A. and its agent, William V. Bradley, induced and encouraged the employees of the Operators, said employees being members of the I. L. A., to engage in a strike against the Operators, an object thereof being to force and require the Operators to cease doing business with M. E. B. A. and to enter into an exclusive collective bargaining agreement with the I. L. A. under the terms of which the I. L. A. would become the exclusive collective bargaining representative of the licensed marine engineers on all tugs of the Operators (R. 2a-3a). The I. L. A. is not the appropriate collective bargaining representative as its membership includes the unlicensed personnel who are supervised by the licensed marine engineers (R. 3a). Nevertheless the I. L. A. did on Decembr 26, 1951, by means of the threat of a strike, succeed in forcing the Operators to enter into such a contract with the I. L. A., which by its terms became effective January 1, 1952 (R. 3a).

The charge further alleged that by the acts therein described the I. L. A. and William V. Bradley had engaged and were engaging in unfair labor practices within the meaning of Section 8(b)(4)(A) of the National Labor Relations Act (R. 2a).

On January 30, 1952, M. E. B. A. filed an amended charge in which it alleged that the licensed marine engineers

were "employers" within the meaning of Sections 2(2) and 8(b)(4)(A) of the National Labor Relations Act because they are agents of the Operators for the purpose of supervising employees on the tugs of the Operators, and that the I. L. A. and William V. Bradley had violated Section 8(b)(4)(A) by inducing and encouraging the employees of the Operators to engage in a strike, an object of which was to force and require the licensed marine engineers to join the I. L. A. (R. 5a-6a). The amended charge further alleged that as a result of such unfair labor practice the Operators were forced and required to and did on December 26, 1951, sign a contract with the I. L. A., effective January 1, 1952, under the terms of which the licensed marine engineers were required to become members of the I. L. A. within thirty days or lose their position as agents of the Operators for the purpose of supervising the employees on the tugs of the Operators (R. 6a-7a).

On April 21, 1952, the Regional Director for the Fourth Region of the National Labor Relations Board, acting upon the charge and amended charge above described, issued a complaint against the I. L. A. and William V. Bradley (R. 9a-12a). The complaint insofar as here material alleged as follows:

The marine engineers on tugboats owned by the Operators, are licensed as engineer officers by the United States Coast Guard pursuant to law and are agents of the Operators in charge of the propulsion machinery of the tugboats and in command of the engine-room crews (R. 10a). By reason of their status as ships' officers and agents of the Operators, such engineers are "employers" within the meaning of Sections 2(2) and 8(b)(4)(A) of the Act (R. 10a).

From October 2, 1951 until December 26, 1951, the I. L. A. demanded that the Operators and the Tugboat Owners and Operators of the Port of Philadelphia, an association composed of the six named operators, which association is hereinafter referred to as the Association of Operators,

enter into a collective bargaining agreement with I. L. A., by the terms of which the licensed marine engineer officers employed by the Operators would be required as a condition of their employment to become members of I. L. A. within thirty days from the effective date thereof and to retain such membership during their employment as such engineer officers (R. 10a).

Beginning on December 16, 1951, I. L. A. by strike vote, orders, instructions, directions, appeals and other means induced and encouraged employees of the Operators and of other employers, to engage in a strike or concerted refusal in the course of their employment to perform services, an object thereof being to force or require the Operators and the Association of Operators to enter into the above described collective bargaining agreement and thereby to force or require the engineer officers in the service of the Operators to join the I. L. A. (R. 10a-11a).

On December 26, 1951, as a result of the inducement and encouragement of the Operators' employees to strike, the Association of Operators entered into a contract with I. L. A. by the terms of which the engineer officers on the tugboats of the Operators as a condition of their continued employment, are required, within thirty days from January 1, 1952, to become and remain members of I. L. A. Enforcement of this condition was temporarily suspended pursuant to agreement reached in open court in an action brought by M. E. B. A. against I. L. A., the Operators and the Association of Operators to declare the contract of December 26, 1951, illegal, null and void (R. 11a).[1]

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1. The case referred to in the complaint is *Marine Engineers Beneficial Association No. 13 and the individual members thereof v. Tugboat Owners and Operators of the Port of Philadelphia, Curtis Bay Towing Company of Pennsylvania, Independent Towing Company, Inc., P. F. Martin, Inc., Sheridan Transportation Company, Taylor and Anderson Towing and Lighterage Company, Bernard Tuckers Sons, United Marine Division International Long-*

By the acts described the I. L. A. and William V. Bradley did engage in, or did induce or encourage the employees of the Operators to engage in, a strike or a concerted refusal in the course of their employment to perform any services, an object thereof being to force or require employers to join a labor organization, thereby having engaged in and engaging in unfair labor practices within the meaning of Section 8(b)(4)(A) of the Act (R. 11a).

The Board did not hold any hearing on the complaint nor did it progress the complaint through its usual procedures but instead, on May 6, 1952, the I. L. A. and William V. Bradley and Ramey Donovan as counsel for the General Counsel of the National Labor Relations Board, entered into a stipulation in purported settlement of the case, which stipulation was consented to by the Association of Operators, subject to the approval of the National Labor Relations Board (R. 13a-21a). By the terms of the stipulation the I. L. A., William V. Bradley and the Association of Operators admitted service upon them of the charge, amended charge, complaint and notice of hearing thereon, waived the filing of answer, hearing, intermediate report of Trial Examiner, the filing of exceptions and oral argument before the Board, the making of findings of fact or conclusions of law by the Board, and all other procedure before the Board and consented to the entry by the Board of the order set forth in the stipulation (R. 13a-15a).

The order which the stipulation set forth for entry by the Board provided that the I. L. A. and William V. Bradley shall not engage in or induce or encourage a strike for the

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shoremen's Association Local No. 333-A, and William V. Bradley, Civil Action No. 13207, now pending in the District Court of the United States for the Eastern District of Pennsylvania. In that suit the defendants contended that the National Labor Relations Board had exclusive jurisdiction of the subject matter of the suit. All proceedings in that action have been continued pending disposition of the instant case by the Board and courts.

purpose of requiring the Association of Operators to comply with the contract of December 26, 1951, insofar as it applies to engineers or to force or require the marine engineers employed by the Operators to join the I. L. A. or any other labor or any employer organization; shall not enforce the contract of December 26, 1951, insofar as it applies to engineers; and shall not request or demand for a period of sixty days after approval of the stipulation by the Board, that the Operators or the Association of Operators recognize the I. L. A. as the exclusive bargaining representative of marine engineer personnel (R. 15a-16a). The order also made provision for the usual posting of notices and notification to the Regional Director of steps taken in compliance (R. 16a-17a).

The stipulation authorized the Board to apply to any United States Court of Appeals for a decree enforcing the order in the terms set forth and waived all notice and defenses to the entry of such a decree (R. 17a).

The M. E. B. A. was not a party to the stipulation and did not waive any of the procedure before the Board to which it was entitled under the Act, and the Rules and Regulations of the Board, but on the contrary filed objections to the proposed stipulation and brief in support thereof in which it urged the Board not to approve the stipulation but instead to return the case to the General Counsel with leave to him to attempt to secure a stipulation for an appropriate remedy or if that was not possible, to proceed with a hearing and the other usual steps required by the Act and by the Rules and Regulations thereunder (R. 22a). As grounds for its objections to the proposed stipulation the M. E. B. A. alleged that the proposed stipulation did not provide the appropriate remedy to which the M. E. B. A. would have been entitled had the case proceeded through hearing, intermediate report, findings of fact, conclusions of law and order by the Board in that the order provided in the proposed stipulation failed to declare the contract of December 26, 1951 illegal, failed to require its

rescission from its inception and failed to bar its remaking but rather expressly left the I. L. A. free at any time after sixty days again to enter into a contract with the Association of Operators requiring all licensed marine engineer officers to join I. L. A. as a condition of manning tugboats (R. 22a, 24a).

In its objections to the proposed stipulation the M. E. B. A. alleged that it is prepared to offer evidence at any hearing which may be held on the complaint which would establish the facts alleged in the complaint and would show that the I. L. A. by strike action in December 1951 forced the Association of Operators to enter into a contract with the I. L. A. covering the period from January 1, 1952, to January 31, 1953, by the terms of which the licensed marine engineer officers on the tugboats of the Operators are required to join and remain members of the I. L. A. during the period of the contract and that the coercive effect of such conduct will continue in effect throughout the term of the aforesaid contract obtained as a result of such coercive action and well beyond the period during which negotiations for its renewal would normally take place (R. 22a-23a).

In its objections M. E. B. A. further contended that the proposed stipulation leaves the I. L. A. free to enjoy in substantial part the fruits of its unfair labor practices, for unless the I. L. A. is barred by order of the Board from again entering into a contract with the Association of Operators requiring all licensed marine engineer officers to join the I. L. A., the I. L. A. is left free to accomplish the object of its unlawful strike action (R. 23a-25a). The M. E. B. A. also alleged that a contract requiring employers to join a labor organization is inconsistent with the rights of both employees and employers to be free of the interference, restraint or coercion of the other in the exercise of self-organization, collective bargaining and other concerted activity (R. 24a).

Attached to its objections to the proposed stipulation was the order proposed by the M. E. B. A., which contains several provisions in addition to those in the Order set forth in the proposed stipulation, the most important of which were its requirement of rescission from its inception of the contract of December 26, 1951, and its absolute prohibition of the I. L. A.'s again requesting or demanding that the Association of Operators or any member thereof require licensed marine engineer officers to join the I. L. A., any other labor organization, or any employer organization as a condition of their employment (R. 27a-29a).

The Board without affording the M. E. B. A. any oral argument on its objections, and without affording the M. E. B. A. the opportunity to present evidence with respect to the character and effect of the unfair labor practices, on August 15, 1952, entered its decision and order, approving the proposed stipulation (R. 34a-35a). Without making any findings of fact with respect to the unfair labor practices and without stating any conclusions of law, the Board entered an order in words and figures identical with that set forth in the proposed stipulation (R. 34a-40a) and described above.

On September 24, 1952, the M. E. B. A. filed its petition for review in the court below alleging that the Board had deprived the M. E. B. A. of the rights to which it was entitled under the National Labor Relations Act and under the due process clause of the Fifth Amendment to the Constitution of the United States when it entered an order disposing of the complaint issued herein without affording the M. E. B. A. the hearing thereon and other procedural steps provided in the National Labor Relations Act and in the Rules and Regulations issued thereunder when the order entered did not accord the M. E. B. A. the full relief to which it would have been entitled had a hearing been held and the evidence introduced thereat fully supported the M. E. B. A.'s charges and the complaint issued thereon

(R. 41-47). The M. E. B. A. requested that the court set aside the order of the Board and remand the case to the Board with directions to the Board to proceed with a hearing upon the complaint and the other usual steps required by the Act and the Rules and Regulations, with leave to the Board not to hold a hearing if it or its General Counsel is able to secure a new stipulation which would provide the remedy to which the M. E. B. A. believes it is entitled under law (R. 46).[2]

On March 10, 1953, the court below handed down its opinion (R. 50-56) and on April 3, 1953, entered its decree (R. 56-57) setting aside the Board's order and remanding the case to the Board for further proceedings as prayed in the petition for review. The court held that after a complaint issued the charging party was entitled to a hearing unless it consented to the settlement reached by the other parties (R. 52-56).

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2. Subsequent to the filing of the petition for review in the court below, the Board filed a petition for enforcement of the same order in the court below. *N. L. R. B. v. United Marine Division, Local 333-A, I. L. A., A. F. L. et al.*, No. 10,887. Proceedings in that case have been held in abeyance pending disposition of the instant proceeding.

ARGUMENT.

The issue of whether, after a complaint has been issued by the Board, it may properly proceed to enter a final order denying in whole or part the relief sought, without holding a hearing thereon, even though the charging party objects, is undoubtedly one of "obvious importance" (R. 51). However the opinion below is sound, accurate, well reasoned and thorough. The language of the Administrative Procedure Act, the National Labor Relations Act, and the Rules and Regulations issued thereunder, is clear and unambiguous and requires the result reached. Indeed, the Board's own instructions to its staff at all times here material required that the consent of the charging party be secured before a hearing on a complaint could be waived. There are no conflicting decisions under the National Labor Relations Act or any other statute. Accordingly we believe there is no need for review by this Court and we oppose the granting of a writ of certiorari.

1. The Administrative Procedure Act, Section 5 (5 U. S. C. 1005), while encouraging the settlement of cases, grants all parties the right to a hearing and decision to the extent they are unable to agree to another disposition of the case. Section 5(b) thereof provides:

> "The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing and decision upon notice and in conformity with sections 7 and 8."

The court below held that this section of the Administrative Procedure Act was in point and applicable (R. 54-55). The Board in its petition for a writ of certiorari tries to avoid the application of this statute to the case at

bar by arguing that the M. E. B. A. is not a party within the meaning of Section 5(b) of the Administrative Procedure Act (Pet., pp. 21-22). Section 2(b) of that Act (5 U. S. C. 1001(b)) defines the term "party" as used in that Act as follows:

> " 'Party' includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding."

The M. E. B. A. was named as a party by the Board when it issued the complaint and continued throughout the proceedings before the Board to be named as a party to the agency proceeding.[3] This is in accord with the Board's Rules and Regulations which list the person filing the charge as one of the persons both to be named as a party and as entitled of right to be a party.[4]

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3. The caption which appears on the decision and order of the Board as printed in the record (R. 34a), also appeared on complaint, notice of hearing, stipulation and all other papers issued by the Board although the caption has been omitted in the printing of those latter papers in the record.

4. Section 102.8 of the Board's Rules and Regulations, effective March 1, 1951 (29 C. F. R. § 102, *et seq.*) provides that "The term 'party' as used herein shall mean the regional director * * * and any person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any Board proceeding, including, without limitation, any person filing a charge * * *".

From the outset of the administration of the Act the charging party has been uniformly recognized as one of the parties to the proceeding. The Rules and Regulations, Series 1, as amended, printed 1 N. L. R. B. 1032 et seq., Art. II, Sec. 5: "After a charge has been filed, if it appears to the Regional Director that a proceeding in respect thereto should be instituted, he shall issue and cause to be served upon the respondent and the person or labor organization making the charge (hereinafter referred to as the 'parties to the proceeding' * * *."

2. The National Labor Relations Act clearly contemplates that all Board orders, whether granting relief or denying relief in whole or in part shall be based upon a record made by the holding of a hearing and the receipt of testimony. The Act expressly makes it mandatory upon the Board to incorporate in every complaint which it issues a notice of hearing. Section 10(b) of the Act provides (49 Stat. 453, 61 Stat. 146, 29 U. S. C. 160):

> "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purpose, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and *containing a notice of hearing* before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint" (emphasis supplied).

Such a notice of hearing accompanied the complaint issued in the instant case (R. 13a).

The Act not only requires a hearing but imposes a duty on the Board to make a written record thereof. Section 10(c) provides:

> "The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board."

The Act further imposes on the Board the duty to state its findings of fact, both when it finds that unfair labor practices have been committed and when it does not so find. In this regard Section 10(c) provides:

> "If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings and shall issue and cause to be served

> on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * * If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint."

The Supreme Court has described the procedures of the Act as basic to a preservation of the rights therein guaranteed. *Republic Aviation Corp. v. N. L. R. B.*, 324 U. S. 793, 799-800, 802.

The making of a record by the holding of a hearing and the writing of a decision explicating the Board's reasons for its orders are essential to judicial review.

In the case at bar this Court has before it no evidence and no findings of fact or conclusions of law with respect to the unfair labor practices alleged. The Board has merely stated that it concludes that the order "will effectuate the policies of the Act" (R. 35a, n. 1). In *Matter of Phelps Dodge Corp.*, 19 NLRB 547, 603, the Board required the reinstatement of certain employees irrespective of whether they had obtained substantially equivalent employment. The Board, as in the case at bar, merely recited that it concluded their reinstatement "will effectuate the policies of the Act." The Supreme Court held that such a statement afforded no proper basis for review. Accordingly it vacated the Board's order in this regard and remanded the case to the Board in order that it could make a record with respect to the point in issue, which would afford a proper basis for judicial review. *Phelps Dodge Corp. v. N. L. R. B.*, 313 U. S. 177, 196-197.

The Supreme Court in cases arising under other statutes has uniformly held that administrative orders must

be set aside and the case remanded for the making of a proper record, where all of the evidence upon which the agency concluded that its order would effectuate the policies of the Act was not reduced to writing and available for court persual. *I. C. C. v. Louisville & Nashville R. Co.*, 227 U. S. 88, 91, 93-94; *United States v. Baltimore & Ohio S. W. R. Co.*, 226 U. S. 14, 20; *Chicago Junction Case*, 264 U. S. 258, 264-265; *Ohio Bell Telephone Co. v. Comm'n*, 301 U. S. 292, 303; *Ashbacher Radio Co. v. F. C. C.*, 326 U. S. 327, 334; cf. *Wilson Inc. v. F. C. C.*, 170 F. 2d 793, 802-803 (App. D. C.).

The National Labor Relations Act does not expressly confer any power upon the Board to settle unfair labor practice cases. The only power it expressly confers upon the Board to issue orders in unfair labor practice cases is the quasi-judicial power to decide issues of law and fact after the traditional type of a hearing in which evidence is received and a record thereof made (Section 10(c)).

At common law the courts deemed it unnecessary to engage in the lengthy and costly processes usually attendant upon litigation whenever all affected parties agreed upon and consented to a judgment. The courts held that under usual principles of contract, waiver and estoppel, the will of the parties afforded the basis for a judgment and obviated the exercise of governmental powers. Indeed, settlements were encouraged at common law, not only because of the saving in time and money but because the resolution of conflicting interests by mutual agreement was preferable to their resolution by the fiat of government, irrespective of the fairness of the hearing and decision. The Board, from the outset of its administration, deemed that its quasi-judicial powers could properly be construed as including the traditional common law power to enter a consent order where both the charging party and the respondent had agreed upon the order which should be entered. The same reasons which motivated common law courts were applicable—the saving in time and money—the better acceptance

of the order by all where it represented the will of both the charged and the charging party rather than the will of a governmental body.[5]

At common law it was well understood that a consent judgment did not represent the judicial determination of a dispute but rather a contractual settlement. The resolution of the conflict had not been by governmental decision of a dispute the parties had been unable to decide. The content of the judgment did not represent an exercise of the power of the court to govern but rather represented a meeting of the minds of all affected in a contract. *Freeman on Judgments,* 5th ed., vol. 3, Secs. 1344, 1350, 1352, pp. 2764, 2773, 2777; *Bank of Glade Spring v. McEwen,* 160 N. C. 414, 76 S. E. 222, Ann. Cas. 1914C 542. In the latter case the court stated (160 N. C. at pp. 426-427):

> "* * * a decree rendered by consent * * * is, in truth, a decree of the parties, and in such a case their will is a sufficient reason for it (*stat pro ratione voluntas*). The court takes no part in the formation of the consent, but merely enters its decree in conformity therewith. But before there can be such a decree, it is absolutely necessary that there should have been a previous consent of the parties to be affected thereby. This constitutes the authority of the court to enter its decree, and is the essential basis of its action."

Since a consent judgment at common law did not represent an adjudication by a court but solely a contract of the parties, any person having an interest in the subject matter of the litigation which was affected by the order, could have it set aside if he did not consent thereto. *Freeman on Judgments,* 5th Ed., Vol. 3, Sec. 1352, p. 2777; *Read v. Davis,* 218 Ark. 76, 234 S. W. 2d 371; *Burnaham v. Heaton,* — Tex. —, 240 S. W. 2d 288; *Deitz v. Bolch,* 209 N. C. 202, 183 S. E 385; *Bank of Glade Spring v. McEwen,* 160 N. C. 414, 423-427, 76 S. E. 222, Ann. Cas. 1914C 542.

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5. See Joseph Rosenfarb, The National Labor Policy and How It Works (1940), p. 518.

The Board has conceived that there was one difference between its position and that of common law courts, namely, that the Board had to protect the public interest in securing compliance with the Act, and hence need not approve a settlement between the charging party and the respondent when it did not appear to afford sufficient protection for the public.

The Board's practices with respect to settlement of cases was described by Joseph Rosenfarb in his book The National Labor Policy and How it Works,[6] pp. 518-519, as follows:

> "The parties to the settlement agreements are the employer, the individual or union bringing the charge, the intervenor, and the board's attorney. * * * The form of the execution of the stipulations is as follows:
>
> "The Smith Company, by Malcolm Smith, President.
>
> "The X Union, by Peter Young, President (or other official).
>
> "John Jones, Attorney, N. L. R. B.
>
> * * *
>
> "Settlements avoid litigation, but they are desirable only if they serve as a procedural short cut to compliance with the act. Because agreements between private parties, as the result of economic compulsion which may intrude itself, may not subserve the enforcement of the public policy of the act, the Board will not recognize them as per se precluding a proceeding under the act. Section 10(a), in providing that the board's power under the act shall not be affected by any agreement, is not limited to agreements between private parties. Hence the settlements entered into

6. Judge Warren Madden in his foreword to this book, p. xxxii, points out that Mr. Rosenfarb writes "from the vantage point of one who has participated" in the administration of the Act.

between the board and the other parties must be in harmony with the act. For instance, a regional director will not advise a compromise which would result in the reinstatement of a discharged employee upon condition of his not belonging to a union, but he would sanction in cases where difficulty may exist in proving the commission of unfair labor practices a compromise which would provide for the reinstatement of discharged employees waiving part or the whole of their back pay. *In any case a settlement is not effected without the consent of the employees and the union involved in the charge.*" (Emphasis supplied.)

None of the cases or extra judicial materials cited by the Board even suggests that the power of any administrative agency to substitute consent orders for adjudicated orders rests on any basis other than the contractual consent of all those affected.

Except for a few years around 1944, the National Labor Relations Board has uniformly required the consent of the charging party to all orders entered without a hearing. The Board's present Statement of Procedure describes its procedures for settlement where a Board order is to be issued as based on the section "The parties agree to waive their right to hearing." (Section 101.9, N. L. R. B. Statement of Procedure, 29 C. F. R., quoted in full in Appendix D, infra, pp. 30-31.) We believe this was meant to describe the Board's understanding that the charging party was entitled to and would be granted a hearing unless the charging party expressly waived hearing. The N. L. R. B. Manual of Practices, Procedures and Policies of January 15, 1944, (a confidential manual for use of the Board's staff and not available to the public, which is quoted and relied upon in the petition for a writ of certiorari, pp. 11, 33-39) is no longer in effect. The subsequent manual issued in 1951 deleted footnote 1 of page 35, of the 1944 Manual which in "exceptional circumstances" made it permissible to conclude a settlement after a complaint issued without

the consent of the charging party and no longer made any provision for a settlement to be effectuated after a complaint issued without the consent of the charging party. The manuals in force at the present time and at all times after 1951 so provide (see pertinent portion of these manuals quoted in Appendix E, *infra*, pp. 24-25).

All of the public records available indicate that it has been the Board's uniform practice to grant the charging party a hearing in every case in which the complaint issued, unless the charging party itself waived the hearing.[7] The Monograph of the Attorney General's Committee on Administrative Procedure of the Board, as well as the Final Report of that Committee, both relied upon by the Board in its petition for a writ of certiorari (pp. 9, 11, 14) reveal that Committee's understanding that all consent orders, which of course issue only in cases where there has been a complaint, rest on the consent of the charging party as well as that of the respondent and any intervenor. Thus the Board (Pet., p. 9) quotes footnote 33 of that Committee's monograph for the proposition that a *pro forma* complaint must issue in all cases where a Board order is to be issued. It omits the following footnote which lists the signatories to such settlement stipulations as generally "the respondent, *the charging party*, the Board's Attorney, the Regional Director, and any intervenor."[8] (Emphasis supplied.)

An examination of the summary of a speech of former Board Chairman J. Warren Madden, now a judge of the United States Court of Claims, quoted from and relied

7. None of the material relied upon by the Board respecting its practices in informal settlements (Pet., pp. 9-17, 31, 35-39) is relevant because by definition an informal settlement is one in a case where no complaint has issued. Admittedly the Board has unlimited discretion not to issue a complaint, which necessarily includes the power to make any disposition it desires of any case in which a complaint has not issued.

8. Atty. Gen. Comm. Ad. Proc., N. L. R. B., S. Doc. No. 10, Part 5, 77th Cong. 1st Sess., p. 8, n. 34.

upon by the Board (Pet., p. 12, n. 4) discloses nothing which would indicate it was either his understanding or the practice of the Board that a case could be settled after complaint issued without the consent of the charging party. Indeed, an examination of summary of the conference which appears in the document cited by the Board for this speech (Conference on Administrative Tribunals under Auspices of American Bar Association, November 13-17, 1939, summarized in 5 LRRM 1163, 1166) shows that the speaker immediately preceding Judge Madden, Thomas E. Kerwin, expressing the employer's point of view, complained of the fact that the Board's power to settle cases "is limited by the fact that three parties must agree to settlement", obviously referring to the Board, the employer and the charging party. (5 LRRM at p. 1165.) Judge Madden said nothing to indicate that Mr. Kerwin misconstrued either the Board's power or practices in this respect.

The quotation of a speech of "another former Board member" which is set out in the Board's petition, pp. 12-13, n. 4, when read in context, shows that the "settlement" there mentioned which Board investigator should not approve was one entered into between the union as the charging party and the employer which despite the union's being a party to the settlement left some of the employees a "belief the Act had been flaunted and damages inadequately repaired." The speech in question was one made by Board Member Edwin Smith before the Harvard Law Students on March 8, 1940, N. L. R. B. Release No. R. 2728. During the earlier portion of his speech he states that 50% of the cases brought to the Board have been "amicably settled between the employer and the complaining union and the representatives of the Board."[9]

Preceding the portion of his speech quoted by the Board, Mr. Smith stated:[10]

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9. P. 7 of N. L. R. B. Release No. R-2728. To the same effect see Rosenfarb, *op. cit.* p. 486.

10. *Ibid.*, pp. 9-11.

"In some instances, and this is the frequent practice in regions which permit easy access to the regional office, almost the first act taken after the charge has been filed is to request a conference at the regional office between the complaining party and the employer. Such conferences are both for elucidation of the facts and to arrange a settlement if there appears to be warrant for going ahead with the case. * * * There is no attempt, of course, to force a settlement upon the employer under threat of hearing. He has his legal rights under the Act and if he chooses to have the case go forward for final adjudication by the Board our agents have no right to dissuade him from this course; all they can do at this stage is to give their personal estimate of the soundness of the case and offer to bring about a settlement which will be *acceptable both to him and the complainant.*

"'* * * *the investigator may believe and have persuaded the employees and the charging union* that the cases of three of the workers are substantial, two of them dubious and one of them weak. If an adjustment of the case is made at that time which results in the restoration of three men to their jobs with back pay, and two without, and no relief for the sixth man, this would represent substantial compliance with the purposes of the Act as of the then established state of facts.

"It might well be that if the case went to hearing the testimony adduced would convince the Board that all six men had been discriminated against * * *

"All of these contingencies come necessarily in the mind of the Board's representative and *the union in considering the desirability of a particular informal settlement.* The Board's agent has a peculiarly delicate responsibility." (Emphasis supplied.)

Then follows the material quoted by the Board (pp. 12-13, n. 4).

In view of this history the court below was entirely accurate in viewing the Board's own practices with regard to requiring the consent of the charging party as affording "quite a little, though not overwhelming proof of the correctness" of the M. E. B. A.'s position (R. 53).

3. The Board's chief basis for seeking review here is its fear of the effect of the decision below as "sharply curtailing the Board's power in this significant area" (Pet., p. 8). This basis for review is completely dissipated by the fact that the Board's own present instructions to its field staff do not authorize them to accept a settlement after complaint issues unless the charging party consents (see present manual quoted Appendix E, pp. 32-35 *infra*). Since the Board has instructed its staff in this fashion, it is clear the decision below has no curtailing effect upon any power it claims to exercise.[11] Rather the decision is fully in accord with the Board's present practices and procedures.

CONCLUSION.

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted

ABRAHAM E. FREEDMAN,
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RUTH WEYAND,
Attorneys for Marine Engineers Beneficial Association, No. 13.

July 17, 1953.

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11. The figure of 6 "unilateral" settlements in 1952 after complaint issued, cited by the Board (Pet., p. 14) evidently represents instances in which the staff violated the Board's instructions to them. Such figures afford no basis for any Board plea for recognition of its power to authorize such settlements.

APPENDIX A.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 146, 29 U. S. C. Supp. V, 151, *et seq.*), are as follows:

[SEC.] 8 (b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, when an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization * * *

* * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce.

* * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said Complaint * * *. Any such complaint may be amended by the member, agent, or agency con-

ducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. * * *

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * * If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. * * * In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof

upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed. * * *

* * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be

conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall

file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact it supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

APPENDIX B.

The relevant provisions of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. § 1001, *et seq.*) are as follows:

SEC. 2. As used in this Act—

* * *

(b) *Person and party.*—"Person" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. "Party" includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes.

* * *

[SEC.] 5 (b) *Procedure.*—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

APPENDIX C.

The pertinent provisions of the Board's Rules and Regulations, Series 6, effective March 1, 1951 (29 C. F. R. § 102, *et seq.*) in effect at the times involved in this proceeding, are as follows:

SEC. 102.8 *Party.*—The term "party" as used herein shall mean the regional director in whose region the proceeding is pending, and any person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any Board proceeding, including, without limitation, any person filing a charge or petition under the act, any person named as respondent, as employer, or as party to a contract in any proceeding under the act, and any labor organization alleged to be dominated, assisted, or supported in violation of section 8(a)(1) or 8(a)(2) of the act; but nothing herein shall be construed to prevent the Board or its designated agent from limiting any party to participate in the proceedings to the extent of his interest only.

* * *

SEC. 102.38 *Rights of parties.*—Any party shall have the right to appear at such hearing in person, by counsel, or by other representative, to call, examine and cross-examine witnesses, and to introduce into the record documentary or other evidence, except that the participation of any party shall be limited to the extent permitted by the trial examiner, and provided further that documentary evidence shall be submitted in duplicate.

* * *

SEC. 102.51 *Settlement or adjustment of issues.*—At any stage of a proceeding prior to hearing, where time, the nature of the proceeding, and the public interest permit, all interested parties shall have opportunity to submit to the regional director with whom the charge was filed, for consideration, facts, arguments, offers of settlement, or proposals of adjustment.

APPENDIX D.

The pertinent provisions of the Board's Statements of Procedure (29 C. F. R. 101 et seq.), in effect at the times involved in this proceeding, are as follows:

SEC. 101.7 *Settlements.*—Before any complaint is issued or other formal action taken, the regional director affords an opportunity to all parties for the submission and consideration of facts, argument, offers of settlement or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit. Normally prehearing conferences are held, the principal purpose of which is to discuss and explore such submissions and proposals of adjustment. The regional office provides Board-prepared forms for such settlement agreements, as well as printed notices for posting by the respondent. These agreements, which are subject to the approval of the regional director, provide for the withdrawal of the charge by the complainant at such time as the respondent has complied with the terms of the settlement agreement. Proof of such compliance is obtained by the regional director before the case is closed. If the respondent failed to perform his obligations under the informal agreement, the regional director may determine to institute formal proceedings.

* * *

SEC. 101.9 *Settlement after issuance of complaint.*—(a) Even though formal proceedings have begun, the parties again have full opportunity at every stage to dispose of the case by amicable adjustment and in compliance with the law. Thus, after the complaint has been issued and a hearing scheduled or even begun, the attorney in charge of the case and the regional director afford all parties every opportunity for the submission and consideration of facts, arguments,

offers of settlement, or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit.

(b) All settlement stipulations which provide for the entry of an order by the Board are subject to the approval of the Board in Washington. If the settlement provides for the entry of an order by the Board, the parties agree to waive their right to hearing and agree further that the Board may issue an order requiring the respondent to take action appropriate to the terms of the adjustment. Usually the settlement stipulation also contains the respondent's consent to the Board's application for the entry of a decree by the appropriate circuit court of appeals enforcing the Board's order.

(c) In the event the respondent fails to comply with the terms of a settlement stipulation, upon which a Board order and court decree are based, the Board may petition the court to adjudge the respondent in contempt. If the respondent refuses to comply with the terms of a stipulation settlement providing solely for the entry of a Board order, the Board may petition the court for enforcement of its labor, pursuant to section 10 of the National Labor Relations Act.

APPENDIX E.

Excerpt from N. L. R. B. 1951 Manual of practices, procedures, and policies for the guidance of the Board's staff:

10230 Types of Adjustments: Charge cases may be adjusted either by formal or informal adjustments.

1. Informal: Informal adjustments are those which do not provide for the entry of a Board order or of a Board order and consent decree. The informal type of adjustment is adequate where the Regional Director believes that it is the intention of the party charged with the unfair labor practice to not engage in further violation of the Act. It is effected through a simple agreement by the parties, usually before issuance of complaint.

Informal settlement agreements are subject to the Regional Director's signature of approval and need not be submitted to the Division of Operations unless a policy question is involved. (or complaint has issued)

Where a complaint has issued, an informal settlement is permissible, but it must be submitted to the Division of Operations together with a full explanation of why a formal settlement was not achieved. An informal settlement of this nature is subject to the administrative approval of the General Counsel but should not provide for his signature approval. Withdrawal of the complaint may be a term of the agreement or may be accomplished by order of the Regional Director upon receiving approval of the agreement.

Informal settlement need not be submitted for approval. See Bulletin 11-53 changing this procedure in this regard. (See footnote)

If an informal agreement is reached after the hearing has opened, the same requirement of signed approval by the Regional Director and administrative approval of the General Counsel holds true. In such event, the field attorney requests the Trial Examiner to adjourn the hearing to permit consideration of the settlement agreement by the Regional Director and the General Counsel. Upon approval of the settlement, the field attorney makes a motion to the Trial Examiner for permission to withdraw the complaint.

Footnote:

BULLETIN No. 11-53 March 5, 1951
TO: All Regional Directors and Officers-in-Charge
FROM: William O. Murdock, Associate General Counsel
SUBJECT: Informal Settlement Agreements

It will no longer be necessary for Regional Directors to obtain authorization from Washington for approval of informal settlement agreements obtained after the issuance of complaint. Regional Directors should, of course, continue to exercise discretion in approving such agreements to guard against any deterioration in our effectiveness in obtaining settlements at informal states.

W. O. M.

Distribution: Supervisors only
Last Bulletin in this category: 10-53

When an informal settlement is negotiated, it is reduced to writing. In some types of cases there are standard forms which set forth the terms of the settlement (Forms NLRB-551, 552). The printed provisions on these forms represent minimum settlement standards for typical cases.

Additional provisions should be added to the standard forms where necessary to meet particular fact situations.

The party charged with the violation and the charging party ordinarily are both parties to the settlement agreement. Form NLRB-552 is used in Section 8(a) cases where the respondent offers to take affirmative remedial action which the charging party is unwilling to accept but which the Regional Director believes will effectuate the purposes of the Act. This form, however, is to be used sparingly and only after every reasonable effort has been made to persuade the charging party to accept the proferred compliance.

If after the execution of an informal settlement agreement there is noncompliance with its affirmative provisions, the remedy lies in the issuance of a complaint. If there are subsequent violations, new charges may be filed, the original case may be reopened and both cases consolidated for complaint. In either event, the case is tried upon its merits before a Trial Examiner and not upon the matter of noncompliance with the settlement agreement.

2. Formal adjustments are those which result in a stipulation for the entry of a Board order and consent decree, or the entry of a Board order only. Field attorneys always participate in drawing up the stipulation for a formal adjustment of a charge. The parties to the usual settlement stipulation include the party charged with the violation, the charging party, the regional office attorney, and any intervenor in compliance with Section 9(f), (g), and (h) of the Act. The field attorney ordinarily signs the stipulation on behalf of the General Counsel.

Prior to or simultaneous with the signing of a formal settlement stipulation, a complaint is issued and served upon the respondent. All settlement stipulations made after issuance of a complaint which provide for the entry of a Board order and consent decree are subject to the approval of the Board. They are forwarded by the regional office to the Division of Operations for approval of the General Counsel and submission to the Board. For full discussion of formal adjustments and suggested techniques for all types of settlement conferences, see 10270-10299.